

1994

# Robert Mabey, Pacific Management v. Stanley L. Wade, Janet B. Wade : Brief of Appellant

Utah Court of Appeals

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M. Shane Smith; Budge W. Call; Smith & Hanna; Attorneys for Plaintiff and Appellant.

Daniel A. Stanton; Aron Stanton, P.C.; Attorney for Defendants and Appellees.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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|   |   |                        |
|---|---|------------------------|
| ROBERT MABEY d/b/a PACIFIC<br>MANAGEMENT, | : | BRIEF OF THE APPELLANT |
|   | : |                        |
| Plaintiff and Appellant,                  | : |                        |
|   | : |                        |
| vs.                                       | : | Appeal No. 940458-CA   |
|   | : |                        |
| STANLEY L. WADE and JANET B.<br>WADE,     | : | Priority No. 15        |
|   | : |                        |
| Defendants and Appellees.                 | : |                        |

---

APPELLANT'S OPENING BRIEF

- - - - -

THIS IS AN APPEAL FROM THE FINAL ORDER OF THIRD CIRCUIT  
COURT JUDGE, DENNIS FUCHS, DATED JUNE 6, 1994, WHEREIN  
APPELLANT WAS DENIED ATTORNEYS' FEES AFTER SUCCESSFULLY  
DEFENDING APPELLEES' MOTION TO SET ASIDE A JUDGMENT.

- - - - -

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Attorneys for Defendants  
and Appellees.

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Attorneys for Plaintiff  
and Appellant.

UTAH COURT OF APPEALS  
BRIEF

**FILED**

FEB - 8 1995

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DOCKET NO. 940458

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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|   |   |                        |
|---|---|------------------------|
| ROBERT MABEY d/b/a PACIFIC<br>MANAGEMENT, | : | BRIEF OF THE APPELLANT |
|   | : |                        |
| Plaintiff and Appellant,                  | : |                        |
|   | : |                        |
| vs.                                       | : | Appeal No. 940458-CA   |
|   | : |                        |
| STANLEY L. WADE and JANET B.<br>WADE,     | : | Priority No. 15        |
|   | : |                        |
| Defendants and Appellees.                 | : |                        |

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- - - - -

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Attorneys for Plaintiff  
and Appellant.

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### Statutes

|  |   |
|--|---|
| Utah Code Ann. § 78-2a-3(2)(d) . . . . . | 1 |
|--|---|

### STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to hear this appeal from the Third Circuit Court, Salt Lake County, State of Utah, under Utah Code Ann. § 78-2a-3(2)(d).

### STATEMENT OF ISSUES FOR REVIEW

1. Did the trial court err in denying plaintiff and appellant (hereinafter "Mabey") his attorneys' fees incurred in protecting the November 22, 1993 Judgment from the Motion to Set Aside, filed by the defendants and appellees (hereinafter "Wade") when the underlying November 22nd Judgment is based on a contract, which unequivocally provides for all resulting collection costs, court costs and reasonable attorneys fees.

2. Did the trial court err in denying Mabey's request for attorneys' fees incurred in protecting the November 22, 1993 Judgment from Wade's Motion to Set Aside the Judgment, when the November 22nd Judgment specifically provides that, "this judgment shall be augmented in the amount of reasonable costs and attorneys' fees expended in collecting said judgment by execution or otherwise".

3. Did the trial court err in denying Mabey's request for attorneys' fees, after finding that Mabey was legally entitled to the fees, but no fees would be awarded because the Motion to Set Aside was not brought in bad faith.

4. Is Mabey entitled to recover his attorneys' fees incurred in bringing this appeal when there is an enforceable contract providing for attorneys fees and when he has been awarded

attorneys' fees in the underlying, November 22nd Judgment, which Mabey was required to defend against the Motion to Set Aside.

#### STANDARD OF REVIEW

The interpretation of a contract to determine whether attorneys' fees are allowed is a question of law which does not require any deference by the appellate court. Saunders v. Sharp, 793 P.2d 927 (Utah App. 1990). If the contract allows for attorneys' fees, it is "legal error" to award less than a reasonable fee to the successful litigant. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988). Cf. Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985) (attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right).<sup>1</sup> The appellate court should review the contract de novo and no deference should be given to the trial court.

#### PRESERVATION OF ISSUES FOR REVIEW

After the trial court ruled in Mabey's favor, denying Wade's Motion to Set Aside the Judgment, Mabey requested his attorneys' fees incurred in defending the Motion to Set Aside. The trial court ruled that although Mabey had attorneys' fees on its November 22, 1993 Judgment, and was probably legally entitled to them on the Motion, the court was not going to award any attorneys fees on the Motion. The issue of attorneys' fees on the Motion was properly raised before the trial court and the court made a specific ruling denying the request. (See Stipulation Regarding Transcript and Certification of Transcription, Exhibit A).

## STATEMENT OF THE CASE

### Nature of the Case

This is an appeal from the final order of Third Circuit Court, Judge Dennis Fuchs, dated June 6, 1994, (Addendum, Exhibit C) denying a Rule 60(b)(1) Motion to Set Aside Judgment filed by Wade to set aside the judgment entered against Wade on November 22, 1993, (Addendum, Exhibit B). The November 22, 1993 Judgment provides for attorneys fees based upon contract. Mabey in this action is appealing the denial of his attorneys' fees incurred in successfully defending against the Motion to Set Aside the November 22nd Judgment.

The Wades, as appellants, in another action, appealed the denial of their Motion to Set Aside. The trial court's denial of their Motion to Set Aside Judgment has been summarily affirmed by this Court in the other action. (Appeal No. 940339-CA).

This Court also filed, sua sponte, a Motion for Summary Disposition of this case, which was briefed by the parties. However, on December 14, 1994, an order was entered denying summary disposition of the case and it was set for briefing.

### Statement of the Facts

1. Mabey and Wade entered into a written agreement whereby Mabey would appeal the property valuation assessed by Salt Lake County against certain property owned by Wade. If successful, Mabey was to collect a fee equal to 1/2 of the tax savings.

2. Mabey filed the appeal with the appropriate tax authorities and obtained a \$4,924.30 tax reduction for Wade on



certain properties. Wade refused to pay Mabey the \$2,462.15 fee previously agreed to by Wade.

3. The written agreement entered into between Mabey and Wades provides that, "In the event of non-payment, Client [Wade] agrees to pay all resulting collection cost, court cost and reasonable attorney fees." (A copy of the contract is attached as Exhibit D).

4. Mabey brought suit against Wade in Third Circuit Court to collect his fee. Mabey obtained a judgment on November 22, 1993, when Wade failed to appear for trial. The November 22nd judgment includes an award of \$2,405.00 for attorney fees incurred. (See November 22, 1993, Judgment, attached as Exhibit B).

5. Wade subsequently sought to set aside the November 22, 1993, Judgment by filing a Rule 60(b)(1) Motion to Set Aside, but was unsuccessful. (See June 6, 1994, Judgment, attached as Exhibit C).

6. Mabey at the hearing on Wade's Motion to Set Aside, requested his attorney fees for successfully defending against Wade's Motion to Set Aside the November 22nd Judgment, but his request was denied, the trial court stated:

I am not going to award any fees on the motion. OK, You have your judgment and you have your fees in your judgment, but I'm not going to award any additional fees. I think that even though you're probably entitled to them, I think the motion was brought in good faith, even though I'm denying it, so I'm not going to award any additional fees. (See Transcript, attached as Exhibit A).

### SUMMARY OF THE ARGUMENT

Mabey is entitled to his attorneys' fees on defending the Motion for Set Aside for a number of reasons: (1) There is a contract between the parties which unequivocally provides for Mabey's reasonable attorneys' fees; and (2) The underlying Judgment provides for Mabey's attorneys' fees incurred in the collection of said judgment by execution or otherwise.

Mabey is also entitled to his attorneys' fees incurred in this appeal as: (1) there is a contract providing for them; (2) he was awarded his attorneys' fees on the underlying Judgment, dated November 22, 1993; and (3) the issues on the Motion to Set Aside and resulting appeal, dealt with the judicial enforcement of the contract.

### ARGUMENT

#### I. MABEY IS ENTITLED TO ATTORNEYS' FEES UNDER THE CONTRACT BETWEEN THE PARTIES.

Mabey is entitled to his attorneys fees under paragraph 3 of the contract with Wade. (Addendum, Exhibit D). This is what the trial court found and ordered in entering the November 22nd Judgment. (Addendum, Exhibit B).

Since there is a contract providing for attorneys fees, the trial court erred in not awarding Mabey his attorneys fees in successfully defending the Motion to Set Aside his Judgment. The long standing premise is that "provisions in written contracts providing for payment of attorneys fees should ordinarily be honored by the courts." Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988).

The Utah Supreme Court has stated that, "contrary to the contention that attorneys fees should be determined on the basis of an equitable standard, attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right." Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985). **"Since the right is contractual, the court does not possess the same equitable discretion to deny attorneys fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees."** Cobabe v. Crawford, 780 P.2d 834, 836 (Utah App. 1989), citing Spinks v. Chevron Oil Co., 507 F.2d 216, 226 (5th Cir. 1975). The November 22nd Judgment is based on a contract with a specific provision for the award of attorneys fees. Mabey is entitled to this attorneys fees as a matter of law, and the trial court erred in denying his attorneys fees.

There have been only a few cases, in extraordinary situations, where court's have declined to award attorneys fees to a prevailing party, in spite of an enforceable contractual provision. Such cases have been when both parties have acted improperly under the terms of the contract, United States v. Mountain States Construction Co., 588 F.2d 259 (9th Cir. 1978) (prevailing party partly at fault for the termination of the contract); or when the prevailing party has acted improperly and in bad faith, Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. 1980) (prevailing party acted unreasonable and incurred needless expense by pursuing suit after unreasonable refusal of two generous offers of settlement). There are no such circumstances in this case.

The trial court refused to award attorneys fees on the grounds that the Motion to Set Aside was not brought in bad faith. This is not enough to deny attorneys fees to the prevailing party when there is a contract providing for them.

The prevailing party in this case did not act in bad faith or improperly. There is no reason, and no legal precedence, for a court to refuse to award attorneys fees to the prevailing party when there is an enforceable contract, simply because the opposing side may not have acted in bad faith. This issue rather, deals with the court's discretionary right under statute to award attorneys fees. In this case there is a contract and Mabey is entitled to his attorneys fees under contract as a matter of law.

## II. MABEY IS ENTITLED TO ATTORNEYS' FEES UNDER THE NOVEMBER 22nd JUDGMENT ENTERED BY THE COURT.

The trial court awarded Mabey his attorneys fees in the November 22nd Judgment that Wade unsuccessfully attempted to set aside. The November 22nd Judgment states that, "this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise".

The Utah Supreme Court has held that attorneys fees rendered in the successful defense of a claim, is the same as if arising out of an action to enforce the contract. Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985). The trial court denied the Motion to Set Aside, therefore, Mabey was successful in

defending his Judgment and should be entitled to his attorneys fees as an expense in enforcing and collecting on the Judgment.

### III. MABEY IS ENTITLED TO ATTORNEYS' FEES INCURRED ON THIS APPEAL.

The general rule is that, when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal. Brown v. Richards, 840 P.2d 143, 156 (Utah App. 1992) citing Management Servs. v. Development Assocs., 617 P.2d 406, 408-09 (Utah 1980). The trial court awarded Mabey his legal fees in the November 22 Judgment that Wade unsuccessfully attempted to set aside. Inasmuch as Mabey prevailed in defending his November 22nd Judgment against Wade, wherein he was awarded his attorneys fees, he is now entitled to his legal fees on appeal. Cobabe v. Crawford, 780 P.2d 834 (Utah App. 1989)

Furthermore, as argued above, Mabey is also entitled to his attorneys fees in defending Wade's Motion to Set Aside the November 22nd Judgment; therefore, attorneys fees are to be awarded on this appeal. Cobabe v. Crawford, 780 P.2d 834 (Utah App. 1989); Jenkins v. Bailey, 676 P.2d 391, 393 (Utah 1984); Estate for Schmidt v. Downs, 775 P.2d 427, 431 (Utah App. 1989).

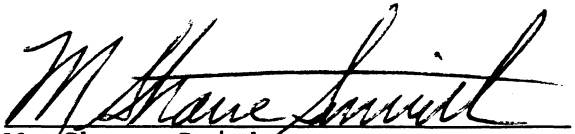
### CONCLUSION

There is an enforceable contract providing for the award of attorneys fees. In the November 22nd Judgment, the trial court properly awarded Mabey his attorneys fees pursuant to the contract.

In defeating Wade's Motion to Set Aside the November 22nd Judgment, Mabey incurred legal fees in successfully enforcing the contract and thus, is entitled to attorneys fees in defending the Motion. Since Mabey is entitled to his attorneys fees in the November 22nd Judgment and in successfully defending the Motion to Set Aside, he is entitled to attorneys fees incurred on this appeal.

DATED this 8<sup>th</sup> day of February, 1995.

SMITH & HANNA

By:   
M. Shane Smith

ADDENDUM

- Exhibit A Stipulation Regarding Transcript and Certification of Transcription.
- Exhibit B Judgment dated November 22, 1993.
- Exhibit C Judgment dated June 6, 1994.
- Exhibit D Contract between parties providing for collection costs, court costs and reasonable attorneys' fees.

CERTIFICATE OF MAILING

I hereby certify on the 21<sup>st</sup> day of February, 1995, two true and correct copies of the foregoing BRIEF OF APPELLANT was mailed first class, postage prepaid, to the following:

DANIEL A. STANTON  
ARON STANTON, P.C.  
2035 East 3300 South, # 314  
Salt Lake City, Utah 84109  
(801) 266-8923

Attorneys for Defendants and  
Appellees.

A handwritten signature in cursive script, appearing to read "Andrew Perry", is written over a horizontal line.

BWC\BRIEF.PA1



Tab A

M. Shane Smith (3007)  
Douglas R. Short (5344)  
SMITH & HANNA, P.C.  
Attorneys for Plaintiff  
311 South State Street, Suite 450  
Salt Lake City, Utah 84111  
Telephone (801) 521-8900

IN THE COURT OF APPEALS, STATE OF UTAH

---

|   |   |                          |
|---|---|--------------------------|
| ROBERT MABEY d/b/a PACIFIC<br>MANAGEMENT, | : | STIPULATION<br>REGARDING |
|   | : | TRANSCRIPTION            |
| Appellant,                                | : |                          |
| vs.                                       | : |                          |
| STANLEY L. WADE and JANET B. WADE,        | : | Appeal No. 940458-CA     |
| Appellees.                                | : |                          |

---

Appellant, Robert Mabey, by and through his attorneys, M. Shane Smith and Douglas R. Short of Smith & Hanna, and Appellees Stanley and Janet Wade, by and through their attorney of record Daniel Stanton, stipulate that the following partial transcription may be accepted by the court as the official transcription of the trial court's ruling on the question of additional attorney fees:

COURT: I am not going to award any fees on the motion. OK, You have your judgment and you have your fees in your judgment, but I'm not going to award any additional fees. I think that even though you're probably entitled to them, I think the motion was brought in good faith, even though I'm denying it, so I'm not going to award any additional fees.


The parties therefore move pursuant to Rule 11(e) (1) that the forgoing be accepted by the Court as the official transcript. This motion is accompanied by a certification by Douglas R. Short,

**EXHIBIT A**

as the person who transcribed the forgoing transcription, that it is true and correct.

DATED this 29<sup>th</sup> day of November, 1994.

SMITH & HANNA

By:   
Douglas R. Short

ARON STANTON

By:   
Daniel Stanton

DRSIMTNRNSC PA1

FILE COPY

M. Shane Smith (3007)  
Douglas R. Short (5344)  
SMITH & HANNA, P.C.  
Attorneys for Plaintiff  
311 South State Street, Suite 450  
Salt Lake City, Utah 84111  
Telephone (801) 521-8900

IN THE COURT OF APPEALS, STATE OF UTAH

---

|   |   |                      |
|---|---|----------------------|
| ROBERT MABEY d/b/a PACIFIC<br>MANAGEMENT, | : | CERTIFICATE OF       |
|   | : | TRANSCRIPTION        |
| Appellant,                                | : |                      |
|   | : |                      |
| vs.                                       | : |                      |
|   | : |                      |
| STANLEY L. WADE and JANET B. WADE,        | : | Appeal No. 940458-CA |
|   | : |                      |
| Appellees.                                | : |                      |

---

I, Douglas R. Short, Esq., do hereby certify that the following passage is a true and correct transcription of the relevant portion of the trial court's ruling rendered from the bench on May 3, 1994, in this matter, and that said ruling was transcribed from the official tape recording of the hearing, Tape # 957, on deposit with the Third Circuit Court:

COURT: I am not going to award any fees on the motion. OK, You have your judgment and you have your fees in your judgment, but I'm not going to award any additional fees. I think that even though you're probably entitled to them, I think the motion was brought in good faith, even though I'm denying it, so I'm not going to award any additional fees.

DATED this 29<sup>th</sup> day of November, 1994.

SMITH & HANNA  
By: Douglas R. Short  
Douglas R. Short

Tab B

Charles W. Hanna (1326)  
M. Shane Smith (3007)  
SMITH & HANNA, P.C.  
Attorneys for Plaintiff  
311 South State, Suite 450  
Salt Lake City, Utah 84111  
Telephone: (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

---

|                              |   |                       |
|------------------------------|---|-----------------------|
| ROBERT MABEY d/b/a PACIFIC   | ) |                       |
| MANAGEMENT,                  | ) | JUDGMENT              |
| Plaintiff,                   | ) |                       |
| vs.                          | ) |                       |
| STANLEY L. WADE and JANET B. | ) | Civil No. 920012860CV |
| WADE,                        | ) | Judge Fuchs           |
| Defendants.                  | ) |                       |

---

This matter having come before the Court at the time regularly set for trial on the 3rd of November, 1993, at the hour of 9:30 a.m., before the Honorable Dennis Fuchs, Judge, Plaintiff being present and represented by counsel, M. Shane Smith of Smith & Hanna, Defendants, Stanley L. Wade and Janet B. Wade, failing to appear and no one appearing as counsel, the Court having waited in excess of 15 minutes for Defendants' appearance and noting that notice had been delivered to James I. Watts, attorney of record, of the date, time and place set for trial, the Court having reviewed the file and record in this matter and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' answer is stricken and judgment is hereby entered against defendants, and each of them, in favor of

EXHIBIT B

plaintiff, in the amount of \$2,462.15, together with said plaintiff's costs and disbursements in the amount of \$134.00, plus interest prior to judgment at the rate of ten percent (10%) in the amount of \$1,165.71; further that attorney's fees be awarded to plaintiff in the total amount of \$2405.86, and that the total amount of the judgment is and shall be \$6033.72. It is further ordered that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit, and that pursuant to Section 15-1-4, Utah Code Anno., 1953, as amended, interest accrue after judgment in the amount of two points over the federal post judgment interest rate,

Judgment rendered this 22 day of November, 1993.

BY THE COURT

Dennis Fuchsa, Judge

By

STAMP USED AT L.P.

MSSJUDG2\_PA1

Tab C



**FILED**

**JUN 07 1994**

Third Circuit Court  
Salt Lake Department

Charles W. Hanna (1326)  
M. Shane Smith (3007)  
SMITH & HANNA, P.C.  
Attorneys for Plaintiff  
311 South State, Suite 450  
Salt Lake City, Utah 84111  
Telephone: (801) 521-8900

IN THE THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT

---

|                              |   |                              |
|------------------------------|---|------------------------------|
| ROBERT MABEY d/b/a PACIFIC   | ) |                              |
| MANAGEMENT,                  | ) |                              |
|                              | ) | ORDER DENYING DEFENDANTS     |
| Plaintiff,                   | ) | MOTION TO SET ASIDE JUDGMENT |
|                              | ) |                              |
| vs.                          | ) |                              |
|                              | ) |                              |
| STANLEY L. WADE and JANET B. | ) | Civil No. 920012860CV        |
| WADE,                        | ) | Judge Fuchs                  |
|                              | ) |                              |
| Defendants.                  | ) |                              |

---

This matter having come before the Court at the time regularly set for hearing on the 3rd of May 1994, at the hour of 8:30 a.m., before the Honorable Dennis Fuchs, Judge, M. Shane Smith of Smith & Hanna, appearing on behalf of Plaintiff, and James I. Watts, appearing for Defendants; and,

This matter having been presented to the Court by way of written briefs, the Court having reviewed same and having heard argument at length from respective counsel, the Court having reviewed the record and file in this matter, and being fully informed, and good cause appearing therefore,

**EXHIBIT C**

IT IS HEREBY ORDERED that defendants motion to set aside the Judgment of November 22, 1993, is hereby denied, upon the grounds and for the reasons propounded by plaintiff that defendants' neglect was not excusable.

BY THE COURT

Dennis E. Fuchs Judge

Approved as to form.

James I. Watts

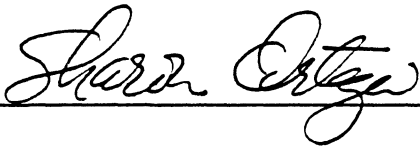
Date

MSSJUDG2.PA1

MAILING CERTIFICATE

I hereby certify on the 26 day of May, 1994, a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT'S RENEWED MOTION TO SET ASIDE JUDGMENT was mailed first class, postage pre-paid, to the following:

James I. Watts  
124 South 600 East, Suite 100  
Salt Lake City, UT 84102

  
\_\_\_\_\_

MSSIORDENY.PA1

Tab D

**PACIFIC MANAGEMENT CORPORATION**

This agreement is made between "PACIFIC MANAGEMENT CORPORATION" (hereafter PMC) and the Owner/s (hereafter Client) of the property noted herein. The property to be researched and appealed by PMC. is located:

2345 E. 7000 S.  
261 S. 800 E. S.C.C. UT.  
\_\_\_\_\_  
(property address) (city) (state) (zip)

The following is agreed by both parties:

1. Client authorizes PMC to appeal the assessed valuation of above property before appropriate government entitles. If PMC determined that it may not be beneficial to appeal the Real Property taxes of property, PMC at their sole discretion, may elect not to proceed with the tax appeal.

2. Client agrees to pay PMC 50% of the first year savings in Real Property Taxes realized by appeal process. Client agrees to pay PMC upon written notice of the Tax reduction. Client empowers PMC or it's officers with limited power of attorney to act in behalf of client in all matters relating to the property tax appeal, direction of or disposition of refund, and or collection of any compensation due PMC.

3. Client agrees to hold PMC harmless of any action arising out of association with PMC. Client agrees to provide all requested documents. In the event of non-payment, Client agrees to pay all resulting collection cost, court cost and reasonable attorneys fees.

4. Client agrees to cooperate and provide any and all assistance, information and documentation necessary for PMC to complete the tax appeal process, including copies of 1989 NOTICE OF PROPERTY VALUATION AND TAX CHANGE and CLOSING STATEMENT if property was purchased within the last year, and to complete the following section as it may apply by filling out the following: (please print)

Robert A. [Signature] August 1, 1990  
PACIFIC MANAGEMENT DATE OWNER SIGNATURE  
OWNER  
CITY STATE ZIP  
AREA TELEPHONE  
DATE

APPROX. DATE PURCHASED \_\_\_\_\_  
PURCHASE PRICE \_\_\_\_\_

EAST 200 SOUTH, SUITE 650

SALT LAKE CITY, UTAH 84111

(801) 532-2662

**EXHIBIT D**